IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02/09/2003

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THE HONOURABLE MR. JUSTICE V.KANAGARAJ

Criminal Original Petition No.24574 of 2003

The Additional Sessions Judge,
Fast Track Court No.II,
Tindivanam. .. Referring Officer

Petition filed under Section 395(2) of the Criminal Procedure Code, praying for the relief as stated therein.

!For referring Officer : Mr.I.Subramaniam,
Public Prosecutor,
High Court, Madras.

:O R D E R

This petition has arisen out of a reference made by the Court of Additional Sessions Judge (Fast Track Court No.II), Tindivanam, in an application filed in Crl.M.P.No.20 of 2003 by the defence in S.C.No.12 6 of 2002 on the file of the said Court, seeking clarification for Section 24(1) of the Code of Criminal Procedure on an application filed by the defence under Section 395(2) of the Code of Criminal Procedure.

2. The learned Public Prosecutor, High Court, Madras, appearing on behalf of the Referring Officer would not only submit his note, but also would argue to the effect that the case is one registered and pending disposal for the offence punishable under Sections 376(2)(B)(C)(G) r/w 218, 201 r/w 376 I.P.C. and as many as 53 witnesses have been so far examined; that at this stage, an objection has been raised by the counsel appearing on behalf of A1, A3, A 4 and A5 challenging the competence of the Additional Public Prosecutor in piloting the prosecution case; that this objection was raised belatedly and Section 225 Cr.P.C. provides that in any trial before the Court of Sessions, the prosecution shall be conducted by a Public Prosecutor, citing instances from various sections of the code such as Section 460 to 466 of Cr.P.C. and quoting from an English Judgment Howard Vs. Bodington reported in 1877-2 PD 203 (N), wherein it has been held in the following manner:-

"There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the court to be of that material importance to the subject matter to which they refer, as that

the legislature could have intended that the non observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end."

"These words can be applied 'mutatis mutandis' to cases where there is no charge at all. The gravity of the defect will have to be considered to determine if it falls within one class or the other. Is it a mere unimportant mistake in procedure or is it substantial and vital? The answer will depend largely on the facts and circumstances of each case."

"It it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established."

3. The learned Public Prosecutor continuing to argue would try to impress the Court stating that even assuming that there is a departure from the provisions contained in Section 225 Cr.P.C. to some extent, the objection itself had been taken belatedly and by no stretch of imagination, any prejudice could be said to have been caused to the accused in the trial of the case. The records in the case would show that Thiru. Mathiyalagan had been acting under the guidance and instructions of the Public Prosecutor, Tindivanam and the notification appointing him as a Special Public Prosecutor under Section 24(8) Cr.P.C. had admittedly been issued within the legal parameters.

4. At this juncture, the learned Public Prosecutor would also refer to a judgment of the Constitutional Bench of the Supreme Court namely, W.Slaney vs. State of M.P. reported in A.I.R. 1956 S.C. 116, wherein it has been held as follows:-
"Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice."

"If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based."

"Now here, as in all procedural laws, certain things are

regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these matters are dealt with by the Code and wherever that is the case full effect must be given to its provisions."

"After all, in our considering whether the defect is illegal or merely irregular, we shall have to take into account several factors, such as the form and the language of the mandatory provisions, the scheme and the object to be achieved, the nature of the violation, etc. Dealing with the question whether a provision in a statute is mandatory or directory."

5. Learned Public Prosecutor would conclude his arguments with the note that a similar petition has been taken by the accused, who are facing trial in S.C.No.127 of 2002 where the case is at the stage of arguments and this Court has stayed the proceeding of the trial court by Crl.M.P.No.3658 of 2003 in Crl.R.C.No.603 of 2003.

6. In consideration of the fact situation of the case, the circumstances encircling the whole affair connected to the reference made on the part of the Court of Additional Sessions Judge (Fast Track Court No.II), Tindivanam, having regard to the materials placed on record and upon hearing the learned Public Prosecutor, what comes to be known is that A.1, A.3, A.4 and A.5 in S.C.No.126 of 2002 have filed Crl.M.P.No.20 of 2003 challenging the competency of the Additional Public Prosecutor in piloting the prosecution case under Section 24(1) Cr. P.C. and filing another Crl.M.P.No.26 of 2003 under Section 395(2) Cr.P.C. praying for a reference to be made to the High Court, chennai, seeking clarification, this reference has been made by the trial court in the said case seeking the direction mentioned supra.

7. For all the above discussions held, particularly from the arguments of the learned Public Prosecutor, High Court, Madras, this Court, not only going through the provision of law under Section 24(1) Cr.P.C., but also drawing the inspiration from the sources of the English law reported from the judgment of the English case mentioned and from that of the judgment of the Larger Bench of the Apex Court of India, the extracts of which have been given supra, if an ultimate decision has to be arrived at, Section 24(1) Cr.P.C. cannot be read in isolation with the other sub sections, but should be read along with all the other sub sections of Section 24 Cr.P.C. i.e. Sub Sections 2 to 9 along with Section 24(1) Cr.P.C.

8. It has to be mentioned that in the Government appointing the Additional Public Prosecutor as per G.O.(D) No.499 dated 14.5.2003 cannot be construed that he alone pilots the prosecution case, but only taking instruction from the main Public Prosecutor and effectively acting under his guidance in projecting the above Sessions Case, in further consideration of the provisions of law embodying the subject, its scheme and object to be achieved, the nature of the deviation, if any, particularly, while dealing with the question whether the provision of law is mandatory or directory.

Therefore, this Court, in application of the same, has to hold that the provision is directory in nature.

9. The sum and substance of Section 24(1) Cr.P.C. along with the other sub-sections of the main Section 24 Cr.P.C. and the fact that only taking instructions from the main Public Prosecutor and with his able guidance, the learned Additional Public Prosecutor appointed under the authority of the said Government Order has been prosecuting the case, would go to show that no legal inconsistency or infirmity has been caused so as to cause prejudice to the accused, and therefore, either in the Government appointing the Additional Public Prosecutor in the manner aforementioned or in the said authority projecting the case taking instructions from the main Public Prosecutor and conducting the same, no deviation or departure from the scheme or object sought to be achieved has been made, but only in consonance with the letter and spirit of the relevant provisions of law.

10. Furthermore, in the said case, it is reported that 53 witnesses have been so far examined and since at this highly belated stage and at the fag end of the trial the objection has been raised, and this Court, in consideration of all these aspects, arrives at the conclusion that there is no legal impediment for carrying on with the trial as it is done by the trial court, thus answering the reference made on the part of the learned Additional Sessions Judge (Fast Track Court No.II), Tindivanam.

In result, the reference is answered in the above manner.

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Index:Yes.
Internet:Yes.

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